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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Amendment of Parts 2 and 25 of the Commission's )  
Rules to Permit Operation of NGSO FSS Systems )  
Co-Frequency with GSO and Terrestrial Systems in )  
the Ku-Band Frequency Range; )

Amendment of the Commission's Rules to )  
Authorize Subsidiary Terrestrial Use of the )  
12.2-12.7 GHz Band by Direct Broadcast Satellite )  
Licensees and their Affiliates; and )

Applications of Broadwave USA, )  
PDC Broadband Corporation, and )  
Satellite Receivers, Ltd. to Provide )  
A Fixed Service in the 12.2-12.7 GHz Band )

ET Docket No. 98-206 /  
RM-9147  
RM-9245

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**COMMENTS OF AT&T CORP.**

AT&T Corp. ("AT&T"), by its attorneys, respectfully submits these comments in response to the Further Notice in the above-captioned proceeding.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

In the First Report and Order in this proceeding, the Commission authorized a new service -- the Multichannel Video Distribution and Data Service ("MVDDS") -- that will operate in the 12.2-12.7 GHz band and will be capable of delivering local broadcast television station signals and data services to customers in unserved and underserved local television markets.<sup>2/</sup> In

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<sup>1/</sup> Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, FCC 00-418 (rel. Dec. 8, 2000) ("Further Notice").

<sup>2/</sup> Id. at ¶ 18.

so doing, the Commission determined correctly that terrestrial licensees can operate in this band without causing “harmful interference” to incumbent DBS licensees.<sup>3/</sup> It now seeks comment on a number of issues related to licensing MVDDS in the 12.2-12.7 GHz band.

As a threshold matter, AT&T submits that the Commission can and should follow its customary practice and assign such licenses using an auction procedure open to any applicant that files within a window to be established once rules for the MVDDS service are adopted. AT&T commends the Commission for recognizing the potential for terrestrial use of this band. As the Commission has acknowledged, wireless technology offers a cost-effective way to bring competition to the local exchange market and to extend the availability of services to remote areas not easily reached by wired technology.<sup>4/</sup> To meet these critical needs, however, there must be sufficient spectrum. Even spectrum currently dedicated to a particular purpose -- such as this band -- should not automatically be considered off limits for compatible uses. Further, licensees should be given the flexibility to deploy any services or technologies that meet market demand in a particular geographic area, so long as the licensee ensures that these new uses do not cause unacceptable interference to existing users.

To this end, AT&T urges the Commission to adopt baseline unavailability criteria essentially as proposed in the Further Notice, and then provide MVDDS licensees with the

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<sup>3/</sup> Id. at ¶ 213.

<sup>4/</sup> See, e.g., Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (recognizing that “wireless service may represent a cost-effective alternative to wireline service in sparsely populated, remote locations where the cost of line extensions is prohibitively expensive”); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (finding that “imposing additional burdens on wireless entrants would be particularly harmful to competition in rural areas, where wireless carriers could potentially offer service at much lower costs than traditional wireline service”).

flexibility to determine which services to offer and how best to configure their systems to satisfy these criteria. The Commission should not impose arbitrary limits on either the services that may be provided using MVDDS spectrum or the entities that may offer those services. Providing MVDDS licensees with such flexibility will help to ensure that the 12.2-12.7 GHz band is put to its best use and that sufficient spectrum is available for MVDDS licensees to provide new and innovative services. AT&T also urges the Commission to license a single 500 MHz block of spectrum in order to provide licensees with a sufficiently large contiguous block of spectrum to provide these services.

## **DISCUSSION**

### **I. COMPETITIVE BIDDING PROCEDURES**

#### **A. The Ku-Band Cut-Off Date Does Not Apply to MVDDS**

At the outset, it is worth addressing threshold arguments against an auction process raised by Northpoint Technology, Ltd. (“Northpoint”). Section 309(j)(1) of the Communications Act requires the Commission to employ competitive bidding to choose among mutually exclusive applications for initial licenses. Northpoint argues that there is no mutual exclusivity in this proceeding and thus no basis for competitive bidding. That argument should be summarily rejected.

According to Northpoint, the cut-off date for non-geostationary satellite orbit Fixed-Satellite Service (“NGSO/FSS”) applications also applied to MVDDS applicants; and because Northpoint is the only MVDDS applicant that filed within the NGSO/FSS window, it is the lone MVDDS applicant.<sup>5/</sup> In support of this argument, Northpoint asserts that the Ku-Band Cut-Off

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<sup>5/</sup> See Ex Parte Submission of Northpoint (filed Aug. 29, 2000) (“Northpoint Ex Parte”) (citing Public Notice, Report No. SPB-141 (rel. Nov. 2, 1998) (“Ku-Band Cut-Off Notice” or “Notice”).

Notice put interested parties on notice that terrestrial MVDDS applications in the 12.2-12.7 GHz band should be filed within the announced NGSO/FSS filing window.<sup>6/</sup> This is an extraordinary position given that MVDDS *did not even exist* at the time the Notice was issued. Not surprisingly, the language of the Notice does not support Northpoint's assertion. By its own terms, the Notice only "establishes the cut-off date for additional *non-geostationary satellite orbit . . . fixed satellite service . . . systems seeking to operate in the [Ku-band] frequencies.*"<sup>7/</sup> The Notice is entirely silent regarding *terrestrial* use of the Ku-band. Had the Commission intended to establish a cut-off date for terrestrial MVDDS in the Ku-Band Cut-Off Notice, the Commission would have said so.

Moreover, had that been the intent, the Commission would have *had* to say so. Notice of a cut-off date must be "reasonably comprehensible to people of good faith."<sup>8/</sup> It cannot result entirely by implication. Thus, a cut-off notice that makes no mention whatsoever of the service to which it allegedly applies – a service which, moreover, had not yet been created by the Commission -- is not "reasonably comprehensible."

Northpoint attempts to bolster its "notice by implication" argument by reading the NGSO/FSS NPRM<sup>9/</sup> in conjunction with the Ku-Band Cut-Off Notice. But the NGSO/FSS

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<sup>6/</sup> See Northpoint Ex Parte.

<sup>7/</sup> Ku-Band Cut-Off Notice at 1 (emphasis added).

<sup>8/</sup> See McElroy Electronics Corp. v. FCC, 86 F.3d 248, 257 (D.C. Cir. 1996) (quoting McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993)).

<sup>9/</sup> Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range and Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates, 14 FCC Rcd 1131 (1998) ("NGSO/FSS NPRM").

NPRM, like the Notice, says nothing about the filing of applications for MVDDS;<sup>10/</sup> rather, its discussion is limited to spectrum sharing between NGSO/FSS and potential terrestrial services.<sup>11/</sup> There is absolutely no reason to believe that the Commission's desire to coordinate spectrum use would put interested parties on notice that the Commission was imposing the NGSO/FSS cut-off date on MVDDS applications. In any event, imposing cut-off dates by implication would have pernicious effects on the licensing process. Under such a regime, *every* service interested in spectrum subject to a cut-off notice would be required to file by the deadline or risk being shut out of an application processing round.<sup>12/</sup> This would pointlessly expand the scope of cut-off notices, result in unnecessary delays, and place additional burdens on applicants and the Commission.

As the Commission has consistently recognized, “[s]uccess in the marketplace . . . should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs—and not by strategies in the regulatory arena.”<sup>13/</sup> Northpoint's attempt to gain a regulatory advantage by filing on the last day of the NGSO/FSS cut-off window and subsequently proclaiming that the filing deadline applies to MVDDS is just such a strategy. It should not be condoned.

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<sup>10/</sup> Indeed, the lack of technical information concerning Northpoint's proposal prompted the Commission to “find it premature to make any proposals based on Northpoint's petition at this time.” Id. at ¶ 98 (emphasis added).

<sup>11/</sup> See id.

<sup>12/</sup> For example, a cut-off date imposed on mobile satellite services (“MSS”) would compel even applicants potentially interested in providing other services in the same band—whether fixed satellite services or mobile or fixed terrestrial services—to file applications.

<sup>13/</sup> Further Notice at ¶ 296 n.598 (quoting Implementation of Sections 2(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1420 (1994)).

## **B. Auctioning MVDDS Licenses Would Serve the Public Interest**

Because it is likely that mutually exclusive applications will, upon appropriate notice, be filed, the Commission is required to determine whether it is in the public interest to avoid mutual exclusivity.<sup>14/</sup> If it is not, the Commission is required to award MVDDS licenses using competitive bidding procedures.<sup>15/</sup> In this instance, it is clear that the public interest would be best served through auction of MVDDS licenses to all eligible bidders that apply after the establishment of an appropriate cut-off window, and not by awarding MVDDS to Northpoint to avoid mutual exclusivity. “More than any other method of awarding construction permits, auctions are likely to foster the rapid deployment of new technologies and products by putting spectrum in the hands of those who value it most highly,”<sup>16/</sup> and “are thus most likely to introduce service rapidly to the public.”<sup>17/</sup> The Commission has “also concluded that competitive bidding would recover for the public a portion of the value of the spectrum.”<sup>18/</sup> Finally, the Commission has determined that competitive bidding will “disseminate licenses among a wide variety of applicants by encouraging participation by all qualified bidders.”<sup>19/</sup>

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<sup>14/</sup> Implementation of Section 309(j) and 337 of the Communications Act of 1934 as Amended, FCC 00-403, ¶ 21 (rel. Nov. 20, 2000) (“Implementation of Section 309(j)”); see also 47 U.S.C. 309(j)(6)(E).

<sup>15/</sup> Implementation of Section 309(j) at ¶ 21, 25. Interpreting Section 309(3) in light of the amendments to Section 309(j)(1) and (2), the Commission held: “This language makes clear that the public interest objectives of Section 309(j)(3) apply broadly to the threshold issue of which licenses should be subject to auction . . .” Id. at ¶ 23.

<sup>16/</sup> Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 FCC Rcd 1297, ¶ 77 (1995).

<sup>17/</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 2941, 2944, ¶ 6 (1994).

<sup>18/</sup> Id. at ¶ 7.

<sup>19/</sup> Id. at ¶ 8.

Thus, the Commission has *consistently* concluded that domestic commercial spectrum should be auctioned.<sup>20/</sup>

There is nothing about Northpoint or MVDDS that sets it apart from all of the other cases in which the Commission has auctioned domestic service licenses, including the fact that the service will share spectrum with satellite operators. Northpoint is not currently licensed to use any portion of the Ku-band spectrum it seeks. To the contrary, it intends to provide a terrestrial service that will directly compete with DBS providers already licensed to use the same spectrum.<sup>21/</sup> Thus, there are no synergies with satellite services to be gained by awarding MVDDS licenses to Northpoint.

Northpoint nonetheless argues against auctioning MVDDS licenses because it has invested resources in developing the service and negotiated an “interference budget” with incumbent DBS operators.<sup>22/</sup> Northpoint, of course, undertook this action on its own initiative, and is entitled to no expectancy on this basis.<sup>23/</sup> But the resolution of spectrum sharing issues is

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<sup>20/</sup> Services that have been auctioned include: (1) narrowband and broadband Personal Communications Services, (2) Public Mobile Services, (3) 218-219 MHz Service, (4) Specialized Mobile Radio Services, (5) Private Carrier Paging Service, (6) General Wireless Communications Service, (7) Local Multipoint Distribution Service, (8) Wireless Communications Service, (9) Digital Audio Radio Service, (10) Direct Broadcast Service, (11) 220-222 MHz radio service, (12) Location and Monitoring Service, and (13) VHF Public Coast Stations. Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, 14 FCC Rcd 5206, ¶ 8 (1999). The Commission has also recently completed its auction of 700 MHz Guard Band and has announced upcoming auctions of (1) the 700 MHz Band, (2) Limited Low Power Television, and (3) 24 GHz Band (“DEMS”).

<sup>21/</sup> Northpoint has abandoned its original proposal to operate its system as an adjunct to DBS services. See Northpoint Petition for Rulemaking at 5 (filed March 6, 1998).

<sup>22/</sup> Northpoint Ex Parte at 11-14.

<sup>23/</sup> Similarly, those who have an experimental authorization earn no entitlement to a permanent authorization, and those who buildout a system pending final approval do so at their own risk. Were this otherwise, private entities would make a mockery of the Commission’s licensing procedures, as they could argue rights to an authorization based solely on their independent, unauthorized actions.

not unique to MVDDS, and the need for terrestrial services to coordinate spectrum use with satellite services has not previously been considered a sufficient reason to foreclose filing of additional, mutually exclusive applications in favor of a single applicant. Moreover, there is no special coordination between satellite and terrestrial services that only Northpoint can achieve, since the entire premise of MVDDS is that it will not cause harmful interference to DBS operations. At most, Northpoint may have a head start in designing its MVDDS service offering. That is hardly the kind of compelling case that would justify a departure from the Commission's consistent practice of assigning domestic licenses through competitive bidding.

It appears that what Northpoint is really seeking is an extraordinarily presumptuous pioneer's preferences -- a single, nationwide license for free as a reward for its efforts in arguing the feasibility of the service. However, Congress has expressly abolished pioneer's preferences, reflecting its judgment that the public interest does not favor handing an advantage to applicants that develop new communications services or technology.<sup>24/</sup> Furthermore, the pioneer's preference rules would never have allowed the windfall Northpoint seeks.<sup>25/</sup> As the Commission (and Congress) well know, spectrum is an extremely valuable resource. The two orbital locations for the Direct Broadcast Satellite service auctioned in 1996, which use the same

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<sup>24/</sup> See Pub. L. 105-33, 111 Stat. 251 (1997); Dismissal of All Pending Pioneer's Preference Requests, 12 FCC Rcd 14006 at ¶ 3 (1997).

<sup>25/</sup> Under the pioneer's preference program, at least the recipient was required to pay a price for its license based on bids for comparable licenses. 47 U.S.C. § 309(j)(13). In addition, a pioneer's preference was not granted unless there was sufficient spectrum to permit at least one additional license to be granted for the same geographic area, which would certainly not be the case if Northpoint were awarded the single, nationwide license for 500 MHz that it seeks. See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 8 FCC Rcd 1659 at ¶ 2 n.4 (1993).

spectrum at issue here, sold for a combined \$734,795,000.<sup>26/</sup> Northpoint's "fairness" argument rings hollow in light of the high price DBS licensees were willing to pay for the same frequencies (and to provide a similar service). Whatever public interest benefits there may be to granting Northpoint's application -- and AT&T submits that there are none -- those benefits would not even approach the value of the spectrum and thus a grant would result in unjust enrichment. Northpoint is simply not entitled to special consideration for its efforts in developing MVDDS, and the public interest would not be served by awarding a license to Northpoint to avoid mutual exclusivity.

Finally, there is also no justification for limiting eligibility for the MVDDS auction to the applications received to date. MVDDS was not clearly authorized until the Further Notice was released, and numerous questions regarding the service still exist. The Commission has not yet determined the area(s) for which licenses will be issued, the amount of spectrum to be awarded per license, or permissible operations for MVDDS. In fact, the fate of the entire service may be in doubt pending interference tests mandated by Congress. Therefore, if there is to be an MVDDS service, the Commission should follow its traditional approach -- establishing service rules before accepting any applications for licenses -- and dismiss the pending applications as prematurely filed.<sup>27/</sup> To forego this approach and limit eligibility for MVDDS licenses to current applicants would amount to the imposition of a cut-off date, and thus suffers from the same defects discussed above.

Moreover, for competitive bidding to work efficiently, the auction must be open to all interested parties. If eligibility to bid is limited to an arbitrary set of applicants that are few in

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<sup>26/</sup> Auction #8, Direct Broadcast Satellite 110 degrees (DBS), Fact Sheet (noting that 110 degree orbital location auctioned for \$682,500,000); and Auction #9, Direct Broadcast Satellite 148 degrees (DBS), Fact Sheet (noting that 148 degree orbital location auctioned for \$52,295,000).

<sup>27/</sup> Further Notice at ¶ 327.

number, parties that place the highest value on the available spectrum may be precluded from participating in the auction. This problem would be exacerbated if numerous licenses are auctioned (such as where DMAs are used). The fewer the applicants, the lower the price per license; and if the prices are low enough, licenses may be purchased solely for speculative purposes or lie fallow for extended periods of time. Experience demonstrates that a single nationwide licensee or small number of licensees will likely concentrate their initial efforts in the largest markets only, bypassing rural subscribers.<sup>28/</sup> Conversely, smaller license areas and a greater number of bidders allow greater targeting of resources and ultimately result in more competition. It is thus clear that limiting the eligible bidders for MVDDS to the current applicants would distort the auction process and undercut the public interest benefits auctions are designed to achieve.

## **II. LICENSING ISSUES**

The Commission asks for comment on the appropriate licensing and service rules for the new MVDDS.<sup>29/</sup> As set forth in more detail below, the Commission should adopt the minimum rules necessary to prevent harmful interference to incumbent DBS operators and otherwise provide MVDDS licensees with maximum flexibility to use this spectrum to provide innovative and additional services to consumers.

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<sup>28/</sup> The Commission has recognized that “rural access to new telecommunication technologies often lags behind the rest of the United States because of higher infrastructure costs.” FCC Report to Congress on Spectrum Auctions, FCC 97-353 at 26 (1997). Northpoint, for example, admits that it will build in “target markets” first, and only later provide service to the remainder of the public. See Northpoint Ex Parte at 20.

<sup>29/</sup> Further Notice at ¶ 283.

#### **A. Permissible Operations for MVDDS**

The Commission asks for comment on possible uses for the 12.2-12.7 GHz band other than the video and one-way high-speed data services proposed by Northpoint.<sup>30/</sup> The Commission proposes that new MVDDS licensees should have “substantial flexibility and a variety of options for using the spectrum to meet market demands within the confines of the technical sharing rules.”<sup>31/</sup> AT&T agrees that MVDDS licensees should have flexibility to determine the specific services to be offered in the 12.2-12.7 GHz band and to modify their service offerings as customer demand evolves. This approach will maximize the spectrum’s value and allow licensees to provide new and exciting services to their customers.<sup>32/</sup>

The 12.2-12.7 GHz band is extremely valuable spectrum because it is well below the rain resonance threshold of millimeter waves, which means that digital services provided in this band will be more reliable in adverse weather than those provided in bands at 24 GHz and above. Highly selective directional customer antennas of a generally accepted size can also be used in the 12.2-12.7 GHz band. Such antennas permit sharing or reuse of spectrum in this band that is much improved over that which is possible at lower microwave frequencies such as those used for MMDS. Depending upon the particular technology deployed, reliable transmission paths could be as much as twenty miles long in the 12.2-12.7 GHz band, compared to only one to one-and-a-half miles in the 38 GHz band. Other than the spectrum used for MMDS, there is little spectrum available in the high performance bands below 24 GHz, which makes this particular band even more valuable to service providers.

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<sup>30/</sup> Id. at ¶ 289.

<sup>31/</sup> Id.

<sup>32/</sup> As the Commission notes, such an approach is also consistent with its general policy of flexible spectrum use. See Principles for Reallocation of Spectrum to Encourage the

AT&T recognizes that any new licensees in the 12.2-12.7 GHz band must not cause harmful interference to incumbent DBS licensees.<sup>33/</sup> AT&T also recognizes that a principal characteristic of the 12.2-12.7 GHz band is its ability to deliver local broadcast television station signals to subscribers in unserved and underserved local television markets.<sup>34/</sup> Within these parameters, however, MVDDS licensees can use the 12.2-12.7 GHz band to provide much more than “one-way direct-to-home/business video and data services.” The Commission should ensure that any licensing and service rules it adopts permit and even encourage MVDDS licensees to do so.

First, it is possible with judicious engineering and deployment to provide two-way services in the 12.2-12.7 GHz band without causing harmful interference to incumbent DBS providers and new NGSO FSS licensees. For example, licensees could use spread-spectrum return paths that limit any interference with DBS to very small increases in the background noise floor experienced in satellite reception. Alternatively, licensees could use narrowband interstitial signals between DBS channels for the return path. Customer deployment geometries different from those proposed by Northpoint can limit any interference exposure to DBS customers from such return signals. Using one of these approaches, two-way services could cost-effectively satisfy the “unavailability criteria” proposed by the Commission for the new MVDDS.<sup>35/</sup> As long as two-way services can satisfy the technical criteria that the Commission ultimately adopts, there is no reason for the Commission to preclude MVDDS licensees from providing them.

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Development of Telecommunications Technology for the New Millenium, Policy Statement, FCC 99-354 at ¶ 9 (rel. Nov. 22, 1999).

<sup>33/</sup> Further Notice at ¶ 213.

<sup>34/</sup> Id. at ¶¶ 18, 290.

<sup>35/</sup> See Further Notice at ¶¶ 266-276.

Second, the Commission should not preclude MVDDS licensees from offering voice services using this spectrum.<sup>36/</sup> Despite the efforts of competitors like AT&T, the incumbent local exchange carriers have maintained and even strengthened their hold on the local telephone service markets during the five years since the passage of the Telecommunications Act of 1996. To stem or even reverse this trend towards “re-monopolization,” the Commission should permit MVDDS licensees to offer competitive alternatives using new and innovative technologies. Indeed, the Commission should not define with specificity or limit the services that may be provided in the 12.2-12.7 GHz band. AT&T believes that the 12.2-12.7 GHz band is suitable for providing two-way video, data, information, and voice services to residential and business subscribers. As long as there is no harmful interference to DBS incumbents, the Commission should allow licensees to respond to market demand to offer these or any other services using technically compatible platforms.

As the Commission has learned, unnecessarily constraining the services that may be offered by a licensee in a particular band will only impede the development of that band. In establishing rules for the Multipoint Distribution Service (“MDS”), the Commission adopted rigid technical and operational rules that essentially prevented MDS licensees from providing

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<sup>36/</sup> The Commission notes that it “does not envision MVDDS as a common carrier service, nor [does it] envision that MVDDS licensees will provide switched voice and data services.” Further Notice at ¶ 295 (internal citations omitted). The Commission should not regulate based upon such expectations, but instead should adopt a flexible approach towards the regulatory status of MVDDS licensees like it did for LMDS licensees and allow them to elect to operate as a common carrier, a non-common carrier, or to provide services on both bases. See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5 GHz Frequency band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545 at ¶¶ 245-251 (1997) (“LMDS Second Report and Order”).

digital and two-way services.<sup>37/</sup> When it became apparent that these technical and operational constraints were preventing the most efficient use of the spectrum in question and undermining the competitiveness of the wireless cable industry, the Commission revised its rules,<sup>38/</sup> but not until it was too late for many of the original licensees.<sup>39/</sup> The Commission should ensure that regulatory “short-sightedness” does not lead to a similar result in the 12.2-12.7 GHz band.

Finally, the Commission should provide flexibility to allow MVDDS licensees to offer multiple services within a given geographic service area and different services in different geographic service areas, in response to market demands particular to each geographic area. For example, in Lumpkin County, Georgia, which is located in the foothills of the Appalachian Mountains, an MVDDS licensee could use the 500 MHz in question to provide different services to satisfy the needs of different population groups. The licensee could provide wireless cable service to residents of the county who are currently unable to receive cable service, i.e. those more than five miles from the county seat, while providing two-way broadband data point-to-point services to the North Georgia College and State University. At the same time, the licensee could use the spectrum to bring broadband Internet access service to the Lumpkin County Board of Education, which is quickly outgrowing its unlicensed 10 Base T (Ethernet) 2.4 GHz wide area network. Limiting the services that an MVDDS licensee can provide in any particular

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<sup>37/</sup> See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Fixed Television Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, Report and Order, 13 FCC Rcd 19112, at ¶ 1 (rel. Sept. 25, 1998) (“MDS Order”).

<sup>38/</sup> Id.

<sup>39/</sup> See, e.g., John Borland, MCI WorldCom Starts High-Speed Wireless Trials, Cnet.com (March 7, 2000) <<http://news.cnet.com/news/0-1004-200-1566283.html>> (noting that the wireless cable companies purchased by MCI WorldCom and Sprint “were available relatively cheaply, having flirted with bankruptcy over the past several years”); Seth Schiesel, Wireless Cable Carriers Finally Cash In, New York Times (July 19, 1999) (describing volatile economics of wireless cable industry during the 1980s and 1990s).

geographic service area would unnecessarily force the licensee to choose which of several deserving population groups to serve.

**B. Technical Criteria for Sharing and Operations in the 12.2-12.7 GHz Band**

The Commission has proposed several alternative methods for ensuring that new MVDDS licensees do not cause harmful interference to DBS providers.<sup>40/</sup> AT&T believes that any of the unavailability criteria proposed by the Commission would prevent a significant increase in DBS outages, while still permitting MVDDS licensees to use a variety of technological approaches to provide service. It is unnecessary, however, to also require a “mitigation zone” around MVDDS transmission equipment, which presumes the use of a particular technology like that proposed by Northpoint. Licensees should be able to deploy any technology that satisfies the unavailability criteria. Such flexibility would help ensure that MVDDS licensees can offer the widest array of services without significantly degrading the quality of DBS service. A mitigation zone requirement, by contrast, would force all MVDDS providers to use a system like that proposed by Northpoint.<sup>41/</sup> The Commission should adopt the least restrictive technical criteria possible, so that licensees have the flexibility to utilize new and innovative technologies and offer the services that such technologies make possible.

**C. Service Areas**

AT&T agrees with the Commission that it should use geographic-area licensing for the MVDDS.<sup>42/</sup> As the Commission notes, site-by-site licensing would be resource intensive for applicants as well as the Commission. While AT&T generally does not have a preference among

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<sup>40/</sup> Further Notice at ¶¶ 266-276.

<sup>41/</sup> Id. at ¶¶ 269, 272, App. H, App. I.

<sup>42/</sup> Id. at ¶¶ 284.

the various service areas proposed by the Commission, it urges the Commission not to adopt a service-specific licensing scheme (such as one using Nielsen's Designated Market Areas) or one that would limit the significant distance benefits available in the 12.2-12.7 GHz band by including geographic service boundaries that are less than 20 miles across in any direction.<sup>43/</sup>

#### **D. Channeling Plan**

The Commission asks whether it should license a single 500 MHz block of spectrum in each service area or whether using another channeling plan, such as licensing two 250 MHz blocks, would better promote the public interest.<sup>44/</sup> AT&T agrees that a single 500 MHz block is preferable because it is sufficiently large to permit service providers to offer a wide range of new and useful broadband services. Licensing a single terrestrial MVDDS provider in each service area also will reduce the number of technical and interference problems that develop between licensees.

#### **E. Power Limitations**

The Commission has proposed to limit MVDDS transmitters to an effective isotropically radiated power ("EIRP") of 12.5 dBm in urban areas, with two exceptions: (1) in service areas with mountain ridges that are over one kilometer from populated subscriber areas, MVDDS licensees are permitted to use higher output power, as long as the increase will not cause the system to exceed the Commission's unavailability criteria; and (2) MVDDS systems located on tall manmade structures and natural formations that are adjacent to bodies of water or other

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<sup>43/</sup> See infra at 4 (discussing the 20 mile transmission paths that are technically feasible in the 12.2-12.7 GHz band).

<sup>44/</sup> Further Notice at ¶ 288.

significant and clearly unpopulated areas are permitted to use higher output power, as long as the increase will not cause the system to exceed the Commission's unavailability criteria.

Only by using highly directional beam antennas can licensees achieve the improved spectrum sharing and higher system gains that produce the significant distance benefits in the 12.2-12.7 GHz band described above. While restricting antenna power may be necessary to ensure that certain technological approaches, like that proposed by Northpoint, do not exceed the Commission's unavailability criteria, they are not necessary for all such approaches. Unnecessarily restricting antenna power could limit innovative use of this spectrum.

Furthermore, the proposed power limitations do not account for the customers' transmitted EIRP in a two-way system. If spread-spectrum technology is used to provide two-way services, however, only a portion of the transmitter's EIRP might interfere with a given DBS channel. Alternatively, if interstitial return paths were used to provide two-way services, then the effective convolution of filtered interference to the affected DBS channels would result in very different maximum customer transmitter EIRP limits under the Commission's proposed unavailability criteria. While the Commission needs to address interference management between adjacent terrestrial operators, the need for EIRP limits could be eased by using techniques such as frequency planning, spectral density control, or downtilting antennas.

The Commission therefore should not adopt specific power limitations and antenna restrictions (like those proposed for the Northpoint approach) unless they are absolutely necessary to ensure that the Commission's unavailability criteria will be satisfied. Generally, there will not be a need to impose such limits on licensees as long as the base-line unavailability criteria are satisfied. Imposing additional tiers of technical restrictions on MVDDS licensees

will only limit their ability to develop new and innovative service offerings and prevent them from using novel interference avoidance techniques.

### **III. LICENSEE ELIGIBILITY**

The Commission seeks comment on its proposal to restrict cable operators from acquiring an attributable interest in an MVDDS licensee within its franchised cable service area, unless such service area has been found by the Commission to be characterized by effective competition.<sup>45/</sup> The Commission asks whether there is a significant likelihood that incumbent cable operators may substantially harm competition by acquiring MVDDS licenses and states that its “initial preliminary analysis” demonstrates that local cable operators may have both the ability and the incentive to acquire MVDDS licenses in order to anti-competitively foreclose entry by new multichannel video programming distribution (“MVPD”) competitors.<sup>46/</sup>

There is no basis for the Commission to adopt eligibility restrictions for MVDDS licenses. The Commission’s proposal to prohibit cable operators from acquiring an attributable interest in an in-market MVDDS licensee assumes that the MVDDS licensee will only offer video services. As set forth above, however, there are many services that could be offered in the 12.2-12.7 GHz band, as long as the Commission does not artificially constrain the services that may be provided. A cable operator may seek to acquire an interest in an in-market MVDDS license in order to provide such services. Alternatively, because of the favorable economics inherent in 12 GHz deployment, a cable operator may use an MVDDS license to provide broadband video and data services within its own or neighboring service areas to customers it was previously unable to serve. Rather than adopting eligibility restrictions that will skew the

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<sup>45/</sup> Id. at ¶ 299.

<sup>46/</sup> Id. at ¶ 298.

licensing process in favor of certain companies, the Commission should allow all potential providers to compete on a level playing field.

The Commission's previous effort to restrict eligibility for the Local Multipoint Distribution Service ("LMDS") demonstrates why such restrictions are unwise. When the Commission established rules for LMDS, it adopted eligibility restrictions similar to those it proposes here because it believed that the spectrum would be used to offer MVPD and telephone services in competition with incumbent cable operators and local exchange carriers.<sup>47/</sup> But the Commission's predictions about how the spectrum would be used turned out to be inaccurate and insufficient to justify the limits on participation. The Commission ultimately allowed the restriction to sunset, after finding several years after adopting the restriction that open eligibility not only did not pose a "significant threat of substantial competitive harm in specific markets" but might even "improve the availability of services, especially in rural areas."<sup>48/</sup>

The Commission's experience in the LMDS proceeding underscores the validity of Chairman Powell's warning that the Commission should not "presume to know which competitors will succeed and in what way these new and innovative services will be best brought to consumers" in rapidly developing markets.<sup>49/</sup> As Chairman Powell has noted, eligibility

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<sup>47/</sup> See LMDS Second Report and Order, 12 FCC Rcd at 12556.

<sup>48/</sup> Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 GHz Frequency band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, Third Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 11857, ¶ 1 (June 27, 2000).

<sup>49/</sup> Separate Statement of Commissioner Michael Powell in Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 GHz Frequency band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, Third Order on Reconsideration, 13 FCC Rcd 4856, 4965 (Feb. 11, 1998).

restrictions like those adopted in the LMDS Second Report and Order and proposed here are often based upon

highly speculative fears about market power and anticompetitive conduct. We too glibly assume that a large company with significant resources and market power in one market is a threat to robust competition in an entirely different -- and often yet developed -- market. We rush to prospectively protect other competitors from this perceived enemy of free and open competition, often with little to substantiate our fears. Indeed, it may be that proven companies are just the animals to create new innovative markets and usher in competition in those markets to the benefit of consumers.<sup>50/</sup>

Commissioner Furchtgott-Roth similarly cautioned in his separate statement in this Further Notice that the Commission “has no clear idea about the types of services that may be offered by [MVDDS] licensees. Perhaps they will offer video, perhaps only data. Therefore today it’s not clear whom these licensees will be competing against, making any auction bar purely speculative.”<sup>51/</sup> The Commission should not prohibit incumbent cable operators from acquiring in-market MVDDS licenses based on such speculative concerns, and should not preclude incumbent cable operators from partnering with other companies or entering into other arrangements in order to participate in any auction of the 12.2-12.7 GHz band.

## CONCLUSION

The 12.2-12.7 GHz band presents a tremendous opportunity for the Commission to make high performance spectrum available for new and innovative services, while ensuring that DBS subscribers in unserved and underserved areas have access to local broadcast signals. The more flexibility the Commission provides MVDDS licensees to structure their service offerings, the greater the public benefits and the more valuable the spectrum will become. Once service rules

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<sup>50/</sup> Id. at 4964.

<sup>51/</sup> Separate Statement of Commissioner Harold Furchtgott Roth in Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, FCC 00-418 (rel. Dec. 8, 2000).

are adopted, the Commission should open the process to additional applicants and auction the spectrum pursuant to Section 309(j). Ensuring that entities that may place the highest value on the spectrum are allowed to compete for it will further the Commission's interest in promoting competition, not impede it.

Respectfully submitted,  
AT&T CORP.

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## CERTIFICATE OF SERVICE

I, Michelle Mundt, hereby certify that on this 12th day of March 2001, I caused copies of the foregoing "Comments of AT&T Corp." to be sent to the following by hand delivery:

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